LIM GEAK LIANG

v.

EAST WEST UMI INSURANCE BHD

FEDERAL COURT, KUALA LUMPUR
MOHD AZMI FCJ
MOHAMED DZAIDDIN FCJ
ABU MANSOR ALI JCA
[CIVIL APPEAL NO: 04-7-1994]
8 SEPTEMBER 1997

CIVIL PROCEDURE: *Appeal - Fresh point, introduction of - Whether permissible - Whether a question of discretion - Interests of justice*

CIVIL PROCEDURE: *Appeal - Interference by appellate court - General principles - When may appellate court interfere with judgment or verdict of lower court - Whether appellate court may decide on a question of fact raised for the first time on appeal - Conditions to be satisfied - Issue of evidential burden*

This was an appeal from the judgment of the High Court dismissing the plaintiff's appeal against the decision of the Sessions Court. The Sessions Court had earlier dismissed the plaintiff's claim of RM50,000 for permanent disablement under a personal accident policy ('the 1st policy') issued to him by the defendant. As it transpired, the defendant had repudiated liability on the ground that the plaintiff had breached condition (4) of the 1st policy in failing to notify the defendant of another policy ('the 2nd policy') being issued to the plaintiff by another insurer. The Sessions Court upheld the defendant's contention and, on appeal, the High Court affirmed it.

Before the instant court, the plaintiff contended that condition (4) of the 1st policy did not require him to notify the defendant of the 2nd policy; he argued that the words "excepting coupon" in condition (4) of the 1st policy expressly excluded policies such as the 2nd policy. The issue central to the instant appeal was, therefore, whether the 2nd policy was a "coupon" within the meaning of condition (4) of the 1st policy thereby exempting the plaintiff from the obligation to notify the defendant. This issue, however, was not pleaded and argued in the courts below and, at the outset of the instant appeal, the defendant raised the objection that it was not open to the plaintiff to argue, on appeal, a fresh point not litigated in and decided by the courts below.

Held:

Per Mohamed Dzaiddin FCJ

[1] As the ground of appeal concerned the construction of condition (4) of the 1st policy, it was within the discretion of the instant court to hear the arguments of the parties. Consequently, the defendant's objection had to be overruled.

[1a] A point which is not raised at the trial and which is raised for the first time in the appellate court must always be most jealously scrutinised. The question of whether effect should be given to such a point is, however, one for discretion. When a question of law is raised for the first time in a court of last resort, upon the construction of a document, or upon facts either admitted or proved beyond controversy, it is not only competent but expedient, in the interests of justice, to entertain the plea.

[2] Although the fresh point sought to be raised by the plaintiff in the instant appeal involved a question of law on the construction of the word "coupon", there was still an evidential burden on the plaintiff to adduce evidence to show that the 2nd policy was a "coupon" within the meaning of condition (4) of the 1st policy. This, however, was a question of fact which could only be decided by the trial judge after hearing the evidence and examining the documents. As a result, the instant court could **not** infer that the 2nd policy was a "coupon" insurance.

[3] Where a decision on a question of law is dependent upon a finding of fact which was not made by a judge or jury because the question was not raised or put at the trial or where the question of law cannot be resolved without further evidence not available on the record, a court of appeal will **not** interfere with the judgment or verdict of the lower court.

[3a] An appellate court is competent to decide a question of **fact** raised for the first time on appeal provided it is satisfied beyond doubt that: (i) it has before it all the facts bearing upon the new contention, as completely as would have been the case, if the controversy had arisen at the trial; and (ii) no satisfactory explanation could have been offered by those whose conduct is impugned if an opportunity for explanation had been afforded them when in the witness box.

[Appeal dismissed.]

PROSEDUR SIVIL: *Rayuan - Pengemukaan perkara baru - Samada dibenarkan - Samada merupakan persoalan budibicara - Kepentingan keadilan*

PROSEDUR SIVIL: *Gangguan oleh mahkamah rayuan - Prinsip umum - Bilakah boleh mahkamah rayuan mengganggui penghakiman atau keputusan mahkamah rendah - Samada mahkamah rayuan boleh memutuskan mengenai satu persoalan fakta yang dibangkitkan buat pertama kalinya ketika rayuan - Syarat-syarat yang harus dipenuhi - Isu mengenai beban keterangan*

Ini adalah satu rayuan daripada penghakiman Mahkamah Tinggi yang menolak rayuan plaintif terhadap keputusan Mahkamah Sesyen. Mahkamah Sesyen telah pada awalnya menolak tuntutan plaintif berjumlah sebanyak RM50,000 bagi ketidak-upayaan tetap di bawah polisi kemalangan persendirian ('polisi pertama') yang telah dikeluarkan kepada beliau oleh defendan. Sepertimana yang berlaku, defendan telah menolak tanggungan atas alasan bahawa plaintif telah memungkiri syarat (4) polisi pertama dengan gagal untuk memberitahu defendan mengenai polisi yang lain ('polisi kedua') yang telah dikeluarkan kepada plaintif oleh penanggung insurans yang lain. Mahkamah Sesyen telah mempertahankan penegasan defendan dan, ketika rayuan, Mahkamah Tinggi telah mengikrarkannya.

Di hadapan mahkamah semasa, plaintif telah menegaskan bahawa syarat (4) polisi pertama tidak memerlukan beliau memberitahu defendan mengenai polisi kedua; beliau berhujah bahawa perkataan "excepting coupon" dalam syarat (4) polisi pertama dengan nyatanya tidak membenarkan polisi-polisi seperti polisi kedua. Isu yang menjadi perkara utama kepada rayuan semasa ini adalah, dengan itu, samada polisi kedua merupakan satu "coupon" dalam lingkungan maksud syarat (4) polisi pertama yang dengan itu mengecualikan plaintif daripada kewajipan untuk memberitahu defendan mengenai polisi pertama tersebut. Isu ini, walaubagaimanapun, telah tidak diplidkan dan dihujahkan dalam mahkamah-mahkamah di bawah dan, pada permulaan rayuan semasa, defendan telah membangkitkan bantahan bahawa ianya tidak terbuka kepada plaintif untuk berhujah, ketika rayuan, satu perkara baru yang telah tidak dilitigasikan dan diputuskan oleh mahkamah-mahkamah di bawah.

Diputuskan:
Oleh Mohamed Dzaiddin HMP

[1] Oleh kerana alasan rayuan berkaitan dengan pembentukan syarat (4) polisi pertama, ianya adalah dalam lingkungan budibicara mahkamah semasa untuk mendengar hujahan-hujahan pihak yang berkenaan. Akibatnya, bantahan defendan haruslah ditolak.

[1a] Satu perkara yang tidak dibangkitkan di perbicaraan dan yang mana telah buat pertama kalinya dibangkitkan dalam mahkamah rayuan hendaklah diberi penelitian yang sepenuhnya. Persoalan samada penguatkuasaan seharusnya diberikan kepada perkara yang sedemikian adalah, walaubagaimanapun, suatu perkara budibicara. Apabila persoalan undang-undang telah dibangkitkan buat pertama kalinya dalam mahkamah, berdasarkan pembentukan sesuatu dokumen, atau berdasarkan fakta-fakta yang samada telah diterimamasuk atau dibuktikan melebihi kontroversi, ianya bukan sahaja kompeten tetapi wajar, demi kepentingan keadilan, untuk melayan rayuan tersebut.

[2] Walaupun perkara baru yang cuba dibangkitkan oleh plaintif dalam rayuan semasa melibatkan persoalan undang-undang mengenai pembentukan perkataan "coupon", masih terdapat beban yang nyata ke atas plaintif untuk mengemukakan keterangan bagi menunjukkan bahawa polisi kedua tersebut adalah "coupon" dalam lingkungan maksud syarat (4) polisi pertama. Ini, walaubagaimanapun, adalah persoalan fakta yang mana hanya boleh diputuskan oleh hakim perbicaraan selepas mendengar keterangan dan memeriksa dokumen-dokumen tersebut. Akibatnya, mahkamah semasa tidak boleh membuat andaian bahawa polisi kedua tersebut adalah insuran "coupon".

[3] Di mana keputusan mengenai persoalan undang-undang bergantung atas pendapat fakta yang telah tidak dibuat oleh seorang hakim atau juri kerana persoalan tersebut telah tidak dibangkitkan atau dikemukakan di perbicaraan atau di mana persoalan undang-undang tersebut tidak boleh diselesaikan tanpa keterangan selanjutnya yang tidak terdapat pada rekod, mahkamah rayuan tidak akan mencampuri penghakiman atau keputusan mahkamah rendah.

[3a] Mahkamah rayuan berkompeten untuk memutuskan persoalan fakta yang telah dibangkitkan untuk pertama kalinya ketika rayuan dengan syarat ianya berpuashati di luar sebarang keraguan bahawa: (i) ianya mempunyai di hadapannya kesemua fakta berhubung dengan penegasan baru itu, seberapa sempurna yang boleh menurut kes tersebut, jika hal yang menjadi kontroversi itu telah berbangkit di perbicaraan; dan (ii) tiada penjelasan yang memuaskan mungkin dapat diberikan oleh mereka yang kelakuannya telah dipersoalkan jika peluang untuk memperjelaskannya telah diberikan ketika mereka berada dalam kotak saksi.

[Rayuan ditolak.]

Cases referred to:
Gulwant Singh v. Abdul Khalik [1965] 2 MLJ 55 ***(foll)***
Ajit Pd v. Nandini A 1975 Or 184 ***(cit)***
Yong Mok Hin v. United Malay States Sugar Industries Ltd [1967] 2 MLJ 9 ***(refd)***
Attorney-General v. Pang Ah Yew [1934] MLJ 184 ***(refd)***
Banbury v. Bank of Montreal [1918] AC 626 ***(refd)***
The Tasmania [1890] 15 App Cas 233 ***(foll)***

Other sources referred to:
Sarkar on Evidence, 14th edn, 1993, p 1338
Halsbury's Laws of England, 4th edn, vol 25, pp 319-320
Ivamy's General Principles of Insurance Law, 4th edn, pp 121-122

[Appeal from High Court Malaya, Alor Setar; Civil Appeal No: 12-53-90]

For the appellant - RJ Manecksha (Ranjit Singh with him); Jag-jit Singh & Co
For the respondent - Renu Zechariah; M/s Anad & Assocs

JUDGMENT

Mohamed Dzaiddin FCJ:

This is an appeal from the judgment of Dato' KC Vohrah J given on 16 December 1993 dismissing an appeal against the decision of the Sessions Court, Alor Setar dismissing the plaintiff's claim of RM50,000 for permanent disability suffered by him under a personal accident policy of insurance (the said policy) issued to him by the defendant, East West UMI Insurance Bhd.

The facts of the case were these. The plaintiff took a policy of insurance from the defendant on 20 May 1986 insuring himself against personal injury or death for the period of 14 May 1986 to 14 May 1987. During the currency of the said policy, ie, on 23 January 1987, while cutting coconut, he accidentally chopped his left thumb. Under the said policy he was entitled to be paid compensation in the sum of RM50,000 for permanent disablement. He gave notice of the accident and submitted his claim which the defendant company refused to pay him on two grounds, the relevant ground in this appeal being that he was in breach of condition 4 of the said policy when he failed to inform the defendant that during the currency of the said policy, another policy had been issued to him by Royal Insurance (M) Sdn. Bhd. for RM100,000.

The plaintiff filed an action against the defendant in the Sessions Court, Alor Setar on 13 December 1988 claiming for RM50,000 under the said policy with interest and costs. The defendant denied liability and pleaded in the defence that by condition 4, the plaintiff was required to notify the defendant of his contracting or effecting any policy with other insurance companies. He failed to do so. Hence, the plaintiff was in breach of condition 4. In the reply, the

plaintiff contended that he was not required under condition 4 to disclose any other insurance effected against accident where such insurance was effected after or during the policy with the defendant. Further, and in the alternative, he contended that condition 4 was vague and ambiguous. After hearing the evidence, her Honour found as a fact that the plaintiff had accidentally cut off his left thumb. She also held that the plaintiff had breached condition 4 of the said policy as he had failed to disclose the existence of the Royal Insurance policy at the material time. She found no ambiguity in the language of condition 4 and ruled against the plaintiff. The defendant was therefore entitled to avoid liability.

The learned High Court judge agreed with her Honour's interpretation of condition 4. In his grounds of judgment, his Lordship dealt with condition 4 of the said policy on the basis of what had been pleaded in the defence and reply and the arguments in the Sessions Court. At p. 45 of Appeal Record, he had this to say:

> It is necessary to set out condition 4 of the policy which reads:
>
> > The Insured shall give immediate notice to the company of any changes of address occupation pursuits or any injury, disease, physical defect or infirmity by the Insured has become affected and also notice of any other Insurance (excepting coupon or in connection with a Motor Insurance Policy) effected against accident or incapacity.
>
> The plaintiff had become a member of the "Eagle Card" scheme. "Eagle Card" is a discount card. In consideration of his becoming a member of the scheme, he was assured under the Group Personal Policies with American International Assurance Co. Ltd from 6 January 1986 to 5 January 1987 for RM100,000. The defendant company complained that the plaintiff did not inform the defendant of the insurance with the Royal Insurance (M) Sdn. Bhd.
>
> The plaintiff contended that he was not required to give notice of any other policy of insurance effected against accident where such policy was effected after or during the policy issued by the defendant. Alternatively it was averred that condition 4 was vague and ambiguous.
>
> The learned judge found no ambiguity in the language of condition 4 and ruled against the plaintiff. I agree with her interpretation of condition 4 that the plaintiff was required to give notice to the defendant of the policy issued by Royal Insurance (Malaysia) Sdn Bhd.

His Lordship continued (p. 47):

> Counsel for the plaintiff also argued that condition 4 was not a condition precedent to liability on the part of the defendant but the short answer to that is that the second opening clause in the policy issued by the defendant company

states that if during the period of the policy of insurance "the insured shall sustain such bodily injury ... the company will subject to the terms provisos exclusion and conditions of and endorsed in this policy **(which terms provisos exclusions and conditions shall** so far as their nature of them respectively will permit **be deemed condition precedent to the right to recover under this policy)** pay to the insured ... the sum or sums specified in the Table of Benefit" (emphasis added).

The plaintiff was fully aware of the policy of insurance issued to cover him by virtue of his being a member of the "Eagle Card" scheme and the defendant is entitled to rely on this clause to say that the plaintiff had not fulfilled his obligation to inform the defendant of the insurance policy issued by Royal Insurance (Malaysia) Sdn. Bhd.

In the result the appeal must fail and I accordingly dismiss the appeal with costs.

The plaintiff appealed against the above judgment on the following ground:

The learned judge erred in finding that the appellant should have notified the respondents of insurance coverage benefiting him by virtue of him being a member of "Eagle Card" when such insurance was expressly excluded by condition 4 of the policy issued to him by the respondents in the words appearing therein *"excepting coupon"* which words signify the description of such Group Personal Policies effecting coverage upon being assigned a discount card.

Clearly, the issue central to this appeal is whether the policy issued to the plaintiff by the Royal Insurance Company as an incentive for his becoming a member of the Eagle Credit Card is a "coupon" within the meaning of the exception clause in condition 4 of the said policy so as to exempt the plaintiff from the obligation of giving notice to the defendant company.

It is worth noting that this issue was never pleaded and argued in the courts below. At the outset of the proceedings, Cik Zachariah, counsel for the defendant, seized the opportunity by raising an objection that it was not open to the plaintiff to argue on appeal a fresh point not litigated and decided by the courts below. We overruled the objection upon the basis that since the ground of appeal concerned the construction of condition 4 of the said policy, it is within our discretion to hear the arguments of the parties. For this conclusion, we are guided by the decision of the Federal Court in *Gulwant Singh v. Abdul Khalik* [1965] 2 MLJ 55, (per Thomson LP at p. 58):

A point which is not raised at the trial and which is raised for the first time in the Court of Appeal must always be most jealously scrutinised *(The Tasmania").* The question of whether effect should be given to such a point is, however, one for discretion (see *Perkowski v. Wellington Corporation*) and

the principles on which that discretion may be exercised have been thus set out in the case of *Connecticut Fire Insurance Co. v. Kavanagh* (per Lord Watson):

> When a question of law is raised for the first time in a court of last resort, upon the construction of a document, or upon facts either admitted or proved beyond controversy, it is not only competent but expedient, in the interests of justice, to entertain the plea.

Although this fresh issue involves a question of law on the construction of the word "coupon", in our view, there is a burden on the plaintiff to adduce evidence that the Royal Insurance Policy was a "coupon" within the meaning of the exception provided in condition 4. *Sarkar on Evidence* 14th Edn. (1993) called this burden as "the burden of proof as a matter of adducing evidence" (p. 1338). "The burden in the sense of adducing evidence shifts from time to time having regard to the evidence adduced or the presumption of fact or law raised in favour of one or the other" (*Ajit Pd v. Nandini*, A 1975 Or 184).

In his submission for the plaintiff, Encik Rumi Manecksha recounted that the plaintiff became a member of the "Eagle Card" and one of the incentives was that he was given a free P.A. policy. He contended that the policy issued by Royal Insurance (M) Sdn. Bhd. by virtue of his being the Eagle Card holder was coupon insurance within the meaning of the word "coupon" under condition 4. He submitted that the defendant, in the course of their insurance business, knew what coupon insurance was. He then referred us to *Halsbury's Laws of England*, 4th Edn. Vol. 25 pp. 319 - 320 and *Ivamy's General Principles of Insurance Law*, 4th Edn. pp. 121 - 122 on general principles and nature of coupon insurance. He concluded that as the Royal Insurance policy was coupon insurance, the plaintiff was excluded by condition 4 from giving notice to the defendant of any other insurance effected against accident or incapacity during the currency of the said policy.

In reply, Cik Zechariah submitted that there was no evidence that a P.A. policy issued to "Eagle Card" holder was coupon insurance. This was a question of fact which could only be decided by the trial judge after hearing the evidence and examining the documents. As such, this court could not infer that the policy issued by Royal Insurance (M) Sdn. Bhd. to the plaintiff was coupon insurance which exempted him from giving notice to the defendant of any other insurance policy under condition 4. On the contrary, counsel submitted that upon the evidence before the trial court, the defendant had shown that the plaintiff was in breach of condition 4 in failing to inform the defendant regarding the P.A. policy issued by Royal Insurance (M) Sdn. Bhd.

In this particular case, whether or not the plaintiff's second policy comes under the exclusion clause, must necessarily depend on the facts. The evidential burden is on the plaintiff to bring himself within the exception. This can only be resolved by the court below after hearing the evidence adduced by the plaintiff. In *Yong Mok Hin v. United Malay States Sugar Industries Ltd.* [1967] 2 MLJ 9, 16, the Federal Court adopted the observations of Reay J and Lord Finlay LC in *Attorney-General v. Pang Ah Yew* [1934] MLJ 184, 187 and *Banbury v. Bank of Montreal* [1918] AC 626 respectively, that on the general principle, where a decision on a question of law is dependent upon a finding of fact which was not made by a judge or jury because the question was not raised or put at the trial or where the question of law cannot be resolved without further evidence not available on the record, a court of appeal would not interfere with the judgment or verdict of the lower court.

From the notes of proceedings in the courts below, we are satisfied that the issue of coupon insurance was never raised by the plaintiff's former counsel. In fact, the argument of the plaintiff's counsel concerning condition 4 before the learned High Court judge was not on the meaning of "excepting coupon", but that the said condition was not a condition precedent to liability on the part of the defendant. Nowhere was the question of coupon insurance argued before the judges below, because otherwise, something would have been said in their respective judgments. We also find no evidence upon which the plaintiff can bring himself within the exception of condition 4.

In *The Tasmania* [1890] 15 App. Cas. 233, (per judgment of Lord Herschell), it was held that a Court of Appeal was competent to decide even a question of fact raised for the first time on appeal provided:

> If it is satisfied beyond doubt, first, that it has before it all the facts bearing upon the new contention, as completely as would have been the case, if the controversy had arisen at the trial; and next that no satisfactory explanation could have been offered by those whose conduct is impugned if an opportunity for explanation had been afforded them when in the witness box.

In the present case, there are absolutely no facts upon which this court can decide on the contention of the plaintiff that the P.A. insurance policy issued to him by Royal Insurance (M) Sdn. Bhd. by virtue of his being an 'Eagle Card' holder was coupon insurance.

For reasons we have stated above, we are not prepared to interfere with the concurrent findings of the courts below and would accordingly dismiss this appeal with costs. Deposit to be paid to the defendant to account of taxed costs.

Reported by Gan Peng Chiang